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A WRITTEN CONSTITUTION IN SOME OF ITS HISTORICAL ASPECTS*

THAT an institution of government, like an institution or practice of society, is a growth and not a creation is now an accepted proposition. No one seeks to argue for it; no one endeavors to deny it. The introduction of this idea into our political thinking strongly influenced our methods and our ideas. In no field of study has the evolutionary idea shown itself more strongly than among workers in history and political science. And yet occasionally one is surprised by seeing how recently this idea has manifested itself in the examination of some historical problems. Until a short time ago, the Constitution of the United States was commonly spoken of as if it was created by some two score men who debated and wrangled in the old state house at Philadelphia during the anxious and trying summer of 1787. Of course it is true that all things are new; and the Federal Constitution was in one sense a new product of the past. But the historian sees its fullest meaning only when he studies the long period during which the fundamental ideas and the master principles of the instrument were being worked out. The idea that the Constitution was not in great measure made at Philadelphia was first successfully attacked only about twenty years ago, when scholars began to show how large a portion of its contents was borrowed from state constitutions, which were themselves the heirs of colonial practices.

But this notion that at given moments, at trying crises, inspired geniuses arise to fashion wondrous entities out of preceding nothingness has played in all our affairs a conspicuous rôle. The American

*An address delivered at the celebration of the fiftieth anniversary of the adoption of the Constitution of Iowa, March 19, 1907.

people, who but yesterday were a European people, casting aside the trammels of old world life, and breaking their way into the new atmosphere of an untried continent, forced to shift for themselves and to adapt themselves to strange conditions, believed actually that they were sufficient in their strength at any moment to create what they needed or desired. This absence of historical perspective was perfectly natural, and there was something inspiring in the enthusiasm and assurance with which problems were solved, or at least valiantly attacked. Possibly this easy self-confidence was quite as useful and much more effective than would have been any serious contemplation, any sober reflection over the forces, the successes and blunders of the past. And yet the readiness to go ahead blindly in answer to the promptings of the moment is not the characteristic of the wisest statesmanship; it is not the nature of the freest state; for the highest freedom must come from right thinking; the best statesmanship must come from self-knowledge—a knowledge of the real state of which the statesman and law-maker is himself a part, a knowledge to be gained by a study of the state's growth and not simply from the little space of one's own forgetful experience.

This introduction is not, I think, inappropriate on an occasion when we celebrate the founding of a constitution which has lasted half a century. We are pausing here to look back for fifty years, to do honor to the men who were instrumental in bringing into existence the fundamental law of this great state, to realize that under that law a people has grown in numbers, in strength, and in prosperity, and to be thankful for the wisdom of the statesmen who wrought so wisely and so well. But we need not think that the constitution of Iowa was made here fifty years ago, or that we can understand its significance, if we limit our view to the debates of the convention, the decisions of the courts or the prosperity of the people. This constitution, like all others, has a long and interesting history, reaching far back of the days when these men met here. Some of its provisions can be clearly known, only if we follow their courses through centuries.

Students of American constitutional history begin at least with the charters that were issued at the end of the fifteenth century. In fact the colonies that sprang from feudal beginnings, like Maryland or Pennsylvania, demand for their understanding a knowledge of feudal principalities; Maryland takes us back to the time of William of Normandy, if not eleven hundred years to the time of Charles the Great. A colony like Massachusetts, founded as a corporation, calls for an understanding of the early trading companies of half a millenium ago. And thus we see that the modern state constitutions

have an honorable lineage; instead of being struck off in a moment of inspiration to suit an emergency or a temporary exigency, they are the products of effort and struggle and experience; they are molded and fashioned by the needs of passing generations. Such a thought as this doubtless makes us hesitant about recasting our laws and makes us skeptical of our ability lightly to create what the moment seems to demand. But the development also shows us that man can not consciously create unchanging institutions for the future; that history, social forces and needs are the real makers. And after all there is no great need of unreasoning fear; you cannot cut yourselves off from the past; it is here with you and will meet you as a friend or an enemy at every turning of your career.

It is not my intention to dwell at length on the development of state constitutions from the old corporation charters. The examples of Connecticut, Rhode Island and Massachusetts are there where every one may read. It is interesting, to be sure, to trace the development of the Massachusetts constitution from the charter, or articles of incorporation, of a company—the president or governor of the company became the governor of a commonwealth; the assistants (the board of directors as we might call them) became the council or senate; the freemen of the company (the stockholders, to use a modern term) became, by representation, the deputies or later the house of representatives. It is profitable to trace the growth of Maryland from a palatinate modeled on the palatinate of Durham into a self-governing state, gradually shaping its institutions to meet the wants of a free people who were growing in capacity for self-government under the stimulus of new opportunity. And of course we must remember that these new western states were, in many ways, but replicas of the eastern states, and that these new communities owe their constitutions therefore to the long history of aspiring colonists and to the shaping and upbuilding work that went on through a century and more of colonial history.

There are, however, other aspects of the subject upon which I wish to dwell; only by studying these can we see the full significance of the modern written state constitution. I have intimated that the history of these documents can be traced back to the feudatories of the middle ages or along another line back to the trading charters of the same era. But following another line, a line of fundamental ideas, we find again that we need to go some distance to the past to appreciate what we have.

It has been said that the modern idea of popular sovereignty, of democratic control, took its rise with the little groups of Separatists, who in the time of Elizabeth set up their right to come together and

worship as they chose. Each little band of worshippers considered itself a church, capable of deciding for itself the principles of its action and establishing its own polity. It is true that any method of historical investigation, which attributes a wide and influential movement vitally affecting a great portion of mankind to one particular episode or to one group of men who can be isolated and numbered, has its elements of untruth; but the connection between the movement for self-determination in church and the movement for self-determination in politics is fairly evident. As to form and methods at least this connection is clear. The assertion that men could govern their own ecclesiastical affairs was a revolt against the principle of superiority in the affairs of the world, a revolt which made way for the assertion of popular control in political affairs. I am not now insisting on the value of the Reformation, which many would consider a misfortune. I am not now emphasizing the individualism that is significant of the Reformation and to which many would attribute the growth of personal freedom. I am confining my attention to this movement for ecclesiastical self-government in England.

We know very well that it was a little body of these Separatists that founded Plymouth and there set up their self-governing church and self-governing state. The famous Compact, of which we have heard so much, has been both unwisely praised and unwisely depreciated. Upon it the little Pilgrim state was founded; for, whatever we may say of technical law and of the subordination to England, Plymouth was to all intents and purposes self-governing and was reared on this Compact, which was a church covenant in fact, turned to new uses to form the basis of a state. It was but the first of a series of plantation covenants; for, while the constitution of Massachusetts was forming, growing out of the charter of a corporation, here and there men were organizing little self-governing communities, built upon the notion of individual right to do what one would with oneself and on the notion that one could form a community by agreement with others. We have not in our histories sufficiently marked the significance of these plantation covenants. We have treated the compact political philosophy of Milton and Sidney and Locke, and other great writers of the seventeenth century, as if they were writing in the rarified air of abstractions and vague theory, and as if the compact origin of society and the state were but a convenient fiction or a useful fancy, forgetting how it in essence underlay the doctrine of Independency and was carried into effect in the churches of the Separatists, forgetting, too, that in

the wilds of the new world little groups of men were giving examples of common life and political control. At a time when men were actually living up to the notion that people were separate and could organize a body by agreement, it is not to be wondered at that the philosophers and political writers should set up political theories based on the notion that society was organized by the action of detached individuals, by abstract individuals, so to speak, who came together to surrender a part of their self-control in order to preserve the rest. Not that I mean to declare that the philosophers actually borrowed their ideas solely from the towns of New England, or even, perhaps, from the Independents of old England; for the doctrine of compact and of a natural right that antedated society was much older than New England or than Cromwell's soldiers. The contention is, first, that this philosophy is more concrete and appears as a more natural emanation of its time, if we connect it with the actual deeds of men; and, second, that Independents were doing in England in ecclesiastical matters the very things which the Puritan philosopher was claiming to be the natural order and process of things in the social and political world. Anyone interested in the political as well as the philosophical influence of Independency will find food for contemplation in the fact that in the efforts at constitution making during the period of the great rebellion of England, in the arguments for establishing a state without a king, the soldiers and officers of Cromwell's army, the Independents, very evidently insisted upon a basis of right and a basis of action quite in advance of that set up by the lawyers and statesmen of the same party, who had not broken away from the old ideas of law and custom and were not ready to start with individual separation and to announce the right to organize a state and a government on the basis of the agreement of the people.

Probably we have not given sufficient weight to the influence of New England on Old England in the days of the great rebellion. To measure influence is beyond the skill of the historian; but we are justified in believing that the reaction of the new world on the old was even then considerable. We are justified in believing that the Puritans of England knew of the success of the men who came across the water to found a Bible commonwealth, and it seems reasonable to believe that the example even of such a state as Rhode Island, distracted and incoherent as it seemed to the orthodox men of Boston, must have had considerable influence with the debaters and thinkers of the trying years, when men were struggling with a tremendously difficult thought—how could a state rid itself of a

king, and how could a popular government resting on the consent of the governed be actually brought into existence?¹

It was inevitable that the men, who were seeking a new political order in the middle of the seventeenth century, should have trouble in seeing their way with clearness along lines that appear to us now fairly obvious. That government sprang originally from the people was proclaimed as a self-evident truth. "It being manifest," as Milton says, "that the power of kings and magistrates is nothing else but what is only derivative, transferred, and committed to them in trust from the people to the common good of them all." But how a new government was actually to be brought into existence was another question, a government derived from the people and obtaining its powers from the people. Devoid of practical machinery and experience, the advanced thinkers of England proposed to act upon theory and to establish a government on the expressed consent and agreement of individuals, as if each were detached and could enter by his signature into a new compact and establish a new government over himself. Nothing is more suggestive to the student of American political institutions than the proposals and the arguments of the men of the great rebellion in England, when they were confronted with the task of organizing a commonwealth, of carrying out their philosophic ideas and of really rearing a state on the consent of the governed.

It is full of interest to American students because one hundred and twenty-five years later a like task faced the men of the Revolution, who sought argument for denying the asserted control of parliament and for throwing off the rule of a king who by "a long train of abuses and usurpations" had "evinced a design to reduce them under absolute despotism." The argument and philosophy of the American uprising against George III take us back at least to the Great Rebellion and to Cromwell's Ironsides and disclose the essential truth in the assertion, that in the American Revolution the England of the seventeenth century met and maintained itself against

¹ No one having any conception of the part played by covenant in the theology of at least some of the advanced Protestant sects could very well fail to see the connection between the whole theological notion and the conception of the organization and powers of the state. Not only did churches, the Congregational churches, have covenants, but the very existence and perpetuity of the world rests, according to this notion, on covenant and agreement. It is the covenants of God, the pledges by which He binds Himself, upon which we rest and upon which we base our hopes and faith. The assurance that the Great Sovereign is bound to His people by solemn covenant and will not disregard His obligation is thus the basis of Christian hope. Covenant, agreement and promise formed the serious central thought of stability, strength and fulfilment. In this way, as well as in many others, the essential notions of Protestant theology worked their way into the conception of the character and obligation of the state.

the England of the eighteenth.² No sententious utterance like this is wholly comprehensive and sound; but it brings out the great fact that the principle that threatened the divine right of kings and asserted the divine right of the people, and that proclaimed that government was derivative and kingship a trust, found its refuge in America in the seventeenth century, developed there in quietness in the spirit and capacity of the people, and came forth to challenge the power of England in its stamp acts and port-bills, and to be used as the basis for proclaiming that these united colonies are and of right ought to be free and independent states.

I wish this statement to be taken not merely as an attempt at rhetoric, but as sober historical truth. The philosophy and the argument, the basis of assertion of the American Revolution, are a striking reproduction of that of the great rebellion in England. The interesting historical fact is that the declaration of the philosopher and the soldier and the Separatist pamphleteer of the middle of the seventeenth century formed the argument for the successful revolution of the eighteenth; and their descendants on this side of the water carried those ideas into effect, not simply by throwing off the power of George III, but by embodying the ideas in institutions and by reducing them from abstract formulæ to actual practical governmental principles.³ As far as theory was concerned, the men of 1650 had worked out fully the basis of the American Revolution.

The notion of natural right, of the origin of government in agreement and consent, did not find its sole expression in the manifesto of independence or in the oratory of the statesman and the demagogue. America, taught by experience with popular institutions, proceeded, sometimes with misgiving and doubt and at other times with haste and overconfidence, to work out the methods for establishing governments on the free consent of the people. The

² See for one illustration of the likeness of the two revolution movements the following: "That when a person trusted with a limited power to rule according to lawe and by his trust (with expresse covenant and oath also) obliged to preserve and protect the Rights and Liberties of the people . . . shall flye to the way of force upon his trusting people, and attempt by it to uphold and establish himself in that absolute tyrannical power so assumed over them, and in the exercise thereof at pleasure; such a person in so doing, does forfeit all that trust and power he had, and (absolving the people from the Bonds of covenant and peace betwixt him and them) does set them free to take their best advantage, and (if he fall within their power) to proceed in judgement against him, even for that alone if there were no more."—A Remonstrance of His Excellency Thomas, Lord Fairfax and of the General Council of Officers. London, 1648. Pp. 21, 22. Compare this with the thought of the Declaration of Independence.

³ The student of the Revolutionary period knows that many lines of argument were followed. I have in mind here the salient and impressive argument that came from Massachusetts and to some extent from other colonies, from Jefferson as well as from Samuel Adams.

statesmen of the time might have actually treated each individual as if he were wholly abstracted from society and ready once again to enter into a new social order out of a state of nature in which he was a detached and separate individual; for such indeed, as in 1650, was the theory underlying much of the thinking of the time and underlying the constitutions that were to be framed; but the leaders did not totally disregard established institutions, draw up a contract and call for signatures. In some of the states the methods were illogical; in Massachusetts, under the guidance of John Adams, a new constitution was framed on the logic of the principles of the Revolution. The constitution of Massachusetts, drawn up by a body of delegates especially chosen for the task, was discussed and debated in the town meetings and ratified by their votes. In that state there came clearly forth the functions, the place, and the character of the constitutional convention—one of the greatest contributions, perhaps the greatest contribution, of America to politics and political order—a method of establishing a commonwealth without confusion, a method of permitting the people to rear, as Adams said, “the whole building with their own hands,” a method of making actual the dreams of philosophers, political pamphleteers and statesmen of the seventeenth century in England. Here again let us not lose ourselves in rhetoric; this identical problem had been attacked by Puritans, from whom the early men of Massachusetts came. The significance of what the Americans did in developing the constitutional convention can be seen in its simplicity and force, only when seen with this background of discussion, uncertainty and desire that fully showed themselves in England one hundred and thirty years before Massachusetts was called on to form her constitution. It may be that, had the principle of contract been strictly lived up to, no one would have been bound by the Massachusetts constitution unless he voted to ratify it; but doubtless any malcontent would have been free to leave the new commonwealth; and we must not lose sight of the fact that the constitution purported on its face to be a social compact.⁴

The principle that the constitution is a compact into which each individual enters out of a state of isolation, which the philosophers called the state of nature, has deeply and perhaps permanently affected our public law. It is astonishing and impressive to see the

⁴ “We therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the universe, in affording us in the course of His providence an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit and solemn compact with each other, . . . do agree,” etc.—Preamble of the Constitution of Massachusetts.

modern jurist talking in terms of compact and natural rights, after the fundamental conceptions, on which those terms rest, have altogether disappeared from ordinary modern thought and modern life. We know perfectly well that government rests on authority, not on the consent of separate individuals; that that authority is the people of the state as an organized political unit; that the constitution expresses the will of that unit, which is known to the law and exists in fact as an entity to establish the constitution. We know, too, that there never was a state of nature in which men existed as monads and from which they entered into society. We know that rights in any legal sense are the creation of law and exist because of government, and that all the new needs and the new justice are not implanted in the heart of primeval man, but have come as he has grown and as society has developed in depth and complexity. We see that the whole thinking, upon which the notion of natural rights and of compact rests, deserves the word artificial; it includes the notion that men consciously, out of stuff in their own hands, can deliberately make a society or a state, as a cabinet maker would fashion a bureau or an easy chair. We know that every branch of modern scientific thought is governed by the thought of growth, of unfolding and not of conscious creation. We thus find perpetrated in our constitutional law—not to speak of other branches of jurisprudence—a method of thinking that the rest of society has entirely abandoned; and one of the greatest puzzles of modern times is to adapt a system of judicature founded in extreme philosophic individualism to the needs of a society which in some of its aspects is almost burdened with its capacity for expressing the truth of organic growth and organic being.⁵ Perhaps it is more correct to say that there is always in society a conflict between the individual and society; but, with all our aggressive individual initiative, the Americans have been gifted too with humanitarian sentiment and with remarkable power of political and social combination. The great combines are in themselves made possible by this spirit and this capacity; and it is a striking fact that, manifesting as they do this phase of American ability, and illustrating in all their activities the essential organic compactness of American life, they seek to be governed by the principles of pure individualistic law, inherited from a time of individualistic thought and endeavor. I am not

⁵ I do not mean to lose sight of what appears to be an historical fact and therefore not artificial, that from time immemorial there seems to have been in England a sense or a feeling, if not properly expressed in law, that there were "real restrictions" upon king and parliament, a certain continuance through the centuries, of the old individualistic feeling of the Teutonic people.—Cf. Jellinek, *Rights of Man and Citizen*, 93. Farrand translation.

unwilling to admit that the doctrine of natural right and of contract may be a convenient fiction, and I should like to believe that law, based on a principle of thinking foreign to the activity and foreign to the thought of the community in which it acts, can be abiding and useful; but there is an evident difficulty in adjustment. Whatever my fears or beliefs may be, the facts are so; and surely it is a startling truth, that just as a phase of human thought, which in some of its aspects was older than the Christian era, was beginning to pass away from the human mind, new bodies politic should be established in this new world based on these old fundamental conceptions, which were indeed for the first time thus given adequate institutional expression.

The great movement for individualism came to its fullest fruition in the Revolution, and was installed in instruments of government that were declared to be permanent; states were organized on a basis of individualistic democracy, just as democracy was about to leave its phase of pure individualism and reach out for a higher, deeper and different meaning—moving on into a condition of society in which the most selfish should reap their highest reward, not through individual and detached effort, but through combination; in which the propelling forces that are upbuilding come from surrender to the spirit of brotherhood and from an effort to raise one's fellows; in which, more than ever before, government is called on to do the things we can not separately do ourselves. We have fully abandoned the idea that the sole duty of government is to keep the peace and to leave to the individual the task of struggling in all kinds of competition with his environment and his neighbors. We do not believe, as Tom Paine says, that government, like dress, is a badge of lost innocence. We have left far behind in most of our thinking the notion that government is man's enemy. The old democratic ideal of man free from restraint, rising by virtue of his own buoyancy to the place he earns by dint of his unaided effort, has not, we hope, entirely gone; subjection or a stagnant condition appear still the essence of injustice. But we are beginning to see that competition, unqualified and unregulated, may be bitterly unjust, and above all that great combinations that take advantage of social organization to work for personal ends need restraint and control in the interest of humanity and society. And so again the puzzling problem which is being worked out in the legislative halls, in the social order, in the books and brains of thinking men, is how to adapt institutions based on individualism, the product of centuries of effort to reach personal right and personal justice free from the restraints and the wrongs of external and arbitrary power—how to

adapt such institutions and how to fashion our political thinking to a new order of things. No more significant contrast could be made than that to be drawn between the utterance of the present leader of the party that claims its descent from Thomas Jefferson, and the assertions of Jefferson himself in his famous inaugural of 1801:⁶ "Still one thing more, fellow citizens—a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities."

To understand properly the modern written constitution and the problems of its existence, we need to look at another line of development. The efforts of English history were to establish a government of laws and not of men—to discover some method of avoiding arbitrary government. Of course this effort was directed against the king, and, in considerable measure because of this opposition to the king, the commons of parliament developed their powers and their privileges. But in the seventeenth century this effort reached a wider stage, and, though at various times we see a desire to increase the powers of parliament against the king, and though often in fact this desire appears to be controlling, it is plain that the ablest minds went farther and sought a government bound in all its parts by some power greater than itself and checked by some restraint which it could not sweep aside. One needs to read only the instrument of government of 1653, in light of the discussions that preceded it, to see that it was a faint approach to a realization of this idea; and the same thought appears in Harrington's *Oceana*, a work which had considerable influence in America one hundred and twenty-five years later.⁷

I have remarked on the trouble men had in thinking of a suitable means of bringing a real popular commonwealth into existence; their difficulty in discovering some suitable manner of binding the government, when once it was created, was even greater. They saw the necessity of stability, of regularity, of rigidity if you will, in the

⁶ I need not say that this contrast is simply an historical fact and not intended as an indorsement or refutation of the advanced democratic collectivism which now dominates one wing of the Democratic party of the day.

⁷ Harrington approached an adequate description of government by the Boss, when he said, "And Government, to define its defects, or according to modern prudence, is an Art whereby some Man or some few Men, subject a City or a Nation, and rule it according to his or their private Interest; which because Laws in such cases are made according to the Interest of a man, or some few families, may be said to be an Empire of Men, and not of Laws."

fundamentals of government and in the bounds of its power. Liberty was not even for them, in their individualism, mere opportunity to do what one would; it consisted, in the minds of the best thinkers, in the privilege of living under a government restrained from acting on whim or caprice. But how attain such an end? No government, it was assumed, could rightly disregard the rights of nature; every governor must rule for the common good. "And so," says Locke in his second *Treatise on Government*, "whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws."⁸ It is not clear that Locke saw those laws as anything more than laws promulgated by the government itself; he did not see—perhaps he did not care to—the use of a constitution superior to government and binding upon it. In the end he resorted to the right of revolution, as a remedy or an assurance that government would keep within limits: "Should either the executive or the legislative, when they have got the power in their hands, design, or go about to enslave or destroy them, the people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to Heaven."⁹

It was this principle of the unalterability of standing law that underlay the American Revolution. The writings of Sam Adams, the Father of the American Revolution, once and again declare this doctrine, maintaining that the English constitution, in its essentials, was not what the parliament might for the moment declare it, but unchangeable; and this very unchangeableness was the basis of liberty. Helped by their experience of life under a written charter of government, the people of Massachusetts, in their argument against Great Britain, carried forward to a logical conclusion the principles of Harrington, Locke and Sidney and the Puritans of a century before. "In all free states," the representatives of Massachusetts declared, "the constitution is fixed; it is from thence that the supreme legislative as well as the supreme executive derives its authority. Neither, then, can break through the fundamental rules of the constitution, without destroying their own foundation."¹⁰

⁸ Locke, *Second Treatise*, § 131. And compare § 22, where he declares "Liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under dominion of any will, or restraint of any law but what that legislative shall enact according to the trust put in it." Locke, of course, wrote forty years after the Great Rebellion; but he phrased admirably much of the thinking on which the advanced actors of the Commonwealth proceeded.

⁹ Locke, *Second Treatise*, § 168.

¹⁰ Written in 1768. Samuel Adams, *Writings*. I, 170, 171.

"There are, my Lord, fundamental rules of the constitution which, it is humbly presumed, neither the supreme legislative nor the supreme executive can alter."¹¹ Thus the Massachusetts Representatives in 1768 expressed the idea of a binding constitution and of the source of governmental authority superior to government—a constitution unalterable because it has its foundation in the immutable laws of nature. Few facts in our constitutional history are more worthy of attention than this meeting of the lines of progress in the announcement of a proposition on which new commonwealths were to be reared and a great war fought to a conclusion: one line runs from the charter of 1628-29, which incorporated a company, a corporation undistinguishable on the surface from the great trading companies like the East India Company or the Hudson Bay Company, whose officers were necessarily limited by the terms of the charter; another line runs from the discussions of the philosophers and soldiers of the seventeenth century in England, who were striving to describe a government of laws and not of men; another line is to be traced to the Separatist foundation of church government, the principle of religious individualism and the organization of polity in agreement and covenant.

But the Americans went farther than announcement. They fully institutionalized this principle of the unalterability and fixity of the constitution. They drew up constitutions impregnated with the principle that liberty exists where government is limited; and little by little they came to the fulfillment of the idea that government is not the state, that it is the servant of the people, that it acts within specified limits, and, to sum all, that constitutions are themselves laws. As a result, any act purporting to be done by governmental authority is mere usurpation, void, if it goes beyond the limit of law. This proposition, fairly easy for men who had lived under colonial legislatures, strikingly concludes the great development of English constitutional history towards a government of laws and not of men and strikingly answers the anxious questioning of the men of one hundred and forty years before. It rests, of course, upon the idea, now made actual, that the government is not the state, and that the fundamental law springs, not from government, but from a power superior to government, the state itself. In realizing this idea and by making the constitution law, the courts were for the first time in history called in to apply the constitution as law, and to sustain the foundations of the state. From the mere fact that the constitution was law, the courts were under obligations to recognize its binding force.

¹¹ *Ibid.*, 156.

Although the judges in a few of the individual states had announced, though not with full and clear logic, a principle similar to this, the Constitution of the United States was the first document distinctly to announce the fact that it was law. This declaration, moreover, was made preëminently to support the arrangement of a federal state, to offer reasonable assurance that the states would not do anything contrary to the Constitution; for it was declared that the Constitution, laws and treaties should be the supreme law of the land and the judges of every state should be bound thereby—in other words, that the judges of the state in deciding suits must recognize and apply the Constitution of the United States. Only one, who has studied the efforts of the thinkers of the seventeenth century to reach an ultimate beyond government, and to make this ultimate of permanent and binding effect, can appreciate the significance of the declaration that the Constitution is law, can see the full meaning of this calling in the courts as a third institution of government to maintain and sustain the essential organization of the body politic.

The idea that the Constitution is law and enforceable in courts has occasioned some criticism and dispute. For at certain junctures even those, who were not unwilling to admit that the legislature was bound by the constitution, have asserted that the activity of the courts is an unwarranted intrusion, although it is based simply on the principle that the law emanating from the people is superior to any act contravening it. And there has arisen, on the other hand, the very foolish idea that the supreme court of a commonwealth is the only tribunal capable of disregarding the law of the legislature on the ground that the law is unconstitutional—an idea based on the strange notion, that only the highest tribunal is called upon to declare and apply the law in distributing justice to litigants. It is, moreover, not uncommonly said that the legislature is confined to considering merely the expediency of measures, and that the courts alone can look into their constitutionality; but this is another absolutely illogical proposition—as if the legislators themselves were under no obligations to endeavor to execute the trust of the people and to keep within the bounds of activity marked out by the people in the making of the constitution. But possibly the most illogical and dangerous of the recent doctrines is the declaration that an administrative officer does not render himself personally liable by the enforcement of an unconstitutional law or administrative act.¹² Such a doctrine at once undermines the principles upon which the

¹² See *Brooks v. Mangan*, 86 Michigan, 576.

rights of the individual rests. It neglects the fundamental notion that each man is responsible for his own wrongs, and that an officer acting beyond the limits of his constitutional authority is not an officer, but a personal trespasser. How shall we preserve "a government of law and not of men," if we can not reach the officer who carries out an illegal act?

At the beginning of the twentieth century we have come, in silence or in noisy disputation, consciously or unconsciously, to doubt some of the fundamental principles on which our institutions have rested. As I have already said, doubts have arisen in the minds of some, who appreciate the nature of our constitutional assumptions, as to whether it is possible for a modern state to do the work with which it is oppressed if it is to continue on a basis of individualism. In some particulars this question has arisen with regard to the application of criminal law. Our constitutional declarations were framed as the result of centuries of unjust and arbitrary treatment of the accused, when the government was supposed to be the enemy of the individual. In enforcing the constitutional privileges it sometimes appears as if the state had forgotten that it was quite as much its duty to convict the guilty as to protect the innocent. To the laymen there would seem to be no reason for the continuance of the individualistic atmosphere of criminal law in a country where crime is rampant, and where the accused, if arrested, finds opportunity to take advantage of numerous and unimportant technicalities—in a country where the law's delay is for the assistance of the predatory and the unsocial.

But more distinctly we have come to doubt whether men can do their duty to man if they are hemmed in by the restrictions of individualistic law. Those who work in the slums of the large cities and give their lives to elevating and comforting their fellow men, who see the horrors of the tenement and the sweat shop, who come face to face with what misery can be wrought by the unbridled energy of avarice and selfish greed, demand now and again, with an energy that comes from conscientious conviction and whole-hearted devotion to right, restraints upon individual privilege of contract, and in reality demand a total surrender of the old-fashioned notion that one can do what one will with one's own. That such demands go too far many may believe; for, after all, the doctrine of the police power is now so widely developed that the state has the right, supported by decisions, to prohibit individual action or to restrain the personal right of contract, where action or agreement appear. In the opinion of legislatures and judges, to be distinctly detrimental

to the public weal. The very latest decisions of the Federal Supreme Court¹³ declare that the police power extends to acts which are conducive to the convenience and prosperity of the community, and not simply to the prohibition of what may be distinctly detrimental to the public health or safety. On such an opinion as this the courts may, it appears, support any state law which would seem on its face conducive to the public well-being, and the old individualistic theory is reduced to a point of view from which to approach the consideration of a governmental act.

This proposition in its wider application has had to make way against all sorts of strenuous opposition, against learned briefs from able lawyers who base their arguments on old conditions, and who start with the old idea that the function of government is to keep the peace and allow individual initiative and individual right of contract full sway. Moreover, there has arisen constant necessity for watching narrowly this power of the state, for it is often invoked not for the common good, but for the supposed advantage of classes and cliques. If a law to limit the hours of work in bakeries, like that of New York recently passed on by the courts, has for its purpose, not the uplifting and protection of the health and well-being of the community, but the giving of advantage to a certain class of workmen without regard to rights and desires of the rest, or if it is merely an attack on an employer's right of contract, it can hardly be rightly supported as an exercise of the police power, which has in recent years made such inroads upon the notion of unrestrained individual struggle. This growth of the police power is a striking development of social rights in opposition to the assertiveness of unchecked individual privilege, and if the individualistic interpretation of our constitution and laws is to abide, it is because, by the exercise of the police power, a new principle of collectivism has become dominant and controlling in cases of a clear and absolute need. This principle of correction is antithetical to the doctrine of socialism in spite of its similarities; it proceeds on the notion of personal ownership and personal right of determination: but it controls individualism by considerations of public well-being and convenience, and, rightly applied, puts the interests of the state

¹³ "In that case," says the Supreme Court of the United States, referring to the case of *Chicago B. & Q. R. R. v. Illinois*, 200 U. S. 561, 592, "we rejected the view that the police power can not be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."—*Bacon v. Walker*. Decided February 4, 1907. *JUSTICE McKENNA*. Under this doctrine any interference with private conduct would be rightly regulated by legislation if it happened to strike the court as substantially helpful to the convenience of the community.

above the interests of any of its members. In developing and applying the police power, the courts have had a new duty that has almost taken them from the field of distinct law; and, if the power is to be rightly and effectively used, it would appear that time and again the judges must be guided not by precedent but by sense of substantial justice and by considerations which appeal rather to their intelligence as statesmen and wise humanists than to the learning of book-read lawyers. If the power is to be rightly and effectively used, I say, for by this route of encroachment on niggardly, selfish, personal greed, the state, the main body of the people, can reach, if they can at all, the popular care for the common well-being, without totally undermining in theory the principles of individualism underlying our laws and constitutions. It appears, indeed, that the courts and law-makers, by one of those startling inversions that occur in human history, have been irresistibly called to grasp and promulgate a new doctrine of natural right—new, at least, as compared with the old doctrine of the Independents, of Sam Adams and Thomas Jefferson—not the doctrine of the right existent in a state of nature, which existed before society, and for the protection of which society was established, but the right of substantial justice to society itself; and in the declaration of what government can do and what it can not do, the sense of this right, like the old natural right, depends, when all is said, on a feeling for justice and not on humanly ordained law or statute. There is need once more to revert to the absolute as shown by the reason.

Within the last few years we have come almost to doubt the wisdom of the Fathers in trying to build up a great empire on the principle of law, in trying to form a great federal state where powers of government are distributed between the center and the parts, and in basing that distribution on a law unchangeable save through a combination and an effort difficult to attain. We have seen how out of our Revolutionary struggle came the states with constitutions recognized as law; and this legal foundation constitutes one of the two or three distinct contributions of the Revolution in its constructive aspect. There came into existence, too, a democratic empire founded on new principles. In the course of the Revolutionary argument certain characteristic differences of opinion between England and America showed themselves. In England the contention was for an empire with all power gathered at the center; all local power was to be exercised of grace and not of legal right. The Americans, in one form or another, demanded a legal empire, in which the localities, the states of the empire, should have their

assured privileges, resting on no caprice of the central authority. After the Revolution two empires were in existence, both the products of English history; one was built on the principle that all legal power was at the center, however meagerly such power might be used, and that an empire could be reared under the guidance of opportunistic common sense and under the tutelage of justice. On this basis England has succeeded, and, following the lamp of experience and led on the whole by wisdom, has created and governed a stupendous empire. America's course has been different. Even before the Constitution was formed, her new colonial system was formulated in the famous Ordinance of 1787, which was fundamentally an unchanging law, as far as the opportunities of the time permitted or appeared to permit. When the Constitution was adopted, the new federal state came into existence, having for its most elementary idea the distribution of power between the center and the parts of a far-reaching democratic empire, a distribution made permanent by law and not to be varied by opportunistic reasoning or by appeals to temporary or eternal justice.

The continuance of a great federal organization, its bounds and partitions firmly marked by law, must depend on the accuracy with which that law distributes authority between the center and the parts. If the distribution is in accord with a mere temporary condition; if it does not leave to the states the powers that are there appropriately exercised; if it denies to the central government the control of subjects really general in character; if there is no proper room for local self-determination; or if, on the other hand, the impulses and desires of the great body of the people find themselves hampered by local obstinacy, local incompetence, or local selfishness and greed; if, in short, the distribution is not based on adequate and abiding justice and need, there is likely to arise conflict, disorder, uncertainty and confusion—I do not mean that there will be war necessarily; but there will be the jolting, jarring and rumbling of ill-adjusted machinery, the presence of political disorders which suggest inappropriateness of governmental system.

The effort to continue uninterruptedly in accord with a Federal Constitution drawn up in days of individualism, and distributing authority between the government and the states, a constitution made at a time when the states were living in comparative isolation, before the railroad, before the telegraph, before the thousand and one changes that have broken down state barriers in fact and welded us in reality, if not in law, into one mass in many social and vital particulars—the effort to continue uninterruptedly on the basis of

such a law has produced difficulties and demanded numerous adjustments. These adjustments have been made easy in part by the general terms in which the Constitution of the United States is framed, making it unnecessary to follow literally the ideas that were present in the minds of its framers, who could not of course foresee one-hundredth of the future development or imagine even faintly its meanings. The only vital changes made in the Constitution by formal amendment since its beginning have been directed to lessening the competence of the state, not to increasing the vigor or the legislative scope of the national government. It is a striking fact, that, even if the states are now declared to be, because of their spatial limitations and their legal limits, unfit for undertaking new duties which have been brought about by the national expansion of industry, the state constitutions have been frequently amended to adapt them to new phases of thought and new needs. They are today almost the best indications of change of public conditions in the last hundred years, while the Constitution of the United States has been altered but once radically, and then for the purpose of calling in national power to *restrain* state activity, not to increase its own legislative competence. Were it not for the fourteenth amendment, there would today be almost nothing the state could not do through its constitution in disregard of individualistic doctrine.

Can our elastic Federal Constitution, framed under conditions so different from those now existing, continue to be respected, in so far as it limits the competence of Congress? Many things have been done in the past and are done daily that are so far in advance of any conception of the Fathers, that we find difficulty, by processes of devious ratiocination, in reconciling them with the idea that the Constitution is a document of enumerated powers. But these changes have come slowly, and we have thought that we were still clinging tenaciously to the principle of law and the theory of constitutional limitation. Now, however, we are frankly told that the great fact of a national conscience, national will, and a national need must be recognized; if the states cannot individually do their duty, it will be done for them. This frank statement is not, as I conceive it, a threat, at least not a declaration of any imperious purpose to disregard the law or arrogantly to sweep state rights into the muck heap. It is an honest, clear-headed avowal of a very evident social truth: state negligence, state incompetence, state selfishness will not be permitted to stand in the way of overpowering national desire and a demanding national conscience; to say so is only to speak

plainly what students of history know. The preservation of state rights depends, as ever, on the performance of state duties. If local self-government, as exemplified by the state capacity for self-management, is still of value, it must be maintained by unselfish devotion to right and justice.

In some particulars it may be that the nation will assume powers simply because they cannot be exercised by the states. We may find the national government taking charge of all trade and industry; we may see a law compelling all corporations engaged in commerce to reorganize under a Federal charter; we may discover that insurance is commerce and that insurance companies doing business outside of a single state are forced to accept national regulations. We may, moreover, find other powers assumed by the national government because the states do not exercise considerably the powers they have; we may conclude that a state like New Jersey cannot be allowed to create trusts as a business, and that manipulation of securities is subject to national control. We may think that state marriage and divorce laws must not be made without consideration for the beliefs (and shall I say the rights?) of the people of other states. We may exercise the national power to prohibit child labor in local factories.

But it should be noticed that in all this there are several serious dangers. In some way we often go on the supposition that the federal authority is not of ourselves, but something apart and above our impulses; and this is simply destructive of the spirit of self-government. If the people of the state are on the whole derelict about duties that *can* be performed through local law, can we have assurance that the authorities at Washington will be superior to unwholesome influence and incompetence? Much of the demand for national interference comes from a curious unreasoning dualistic conception, as if the national government were a power disassociated from the people of the state, and as if the people of the United States were not also the people of the states. We forget also that because of our complicated system of checks and balances, because of an administrative system without ministerial responsibility, and because of political parties with a tremendous organization almost unknown to the law, national action can with great difficulty be made responsive to popular mandates.

I can not refrain from pointing out also what each of you must have thought of—the danger that comes from a conscious disregard of law. If the national government in answer to a real national need can assume powers that are not granted, not only shall we

lose local autonomy in considerable measure and surrender to that degree our conception of a federal state; but we shall consciously give up the idea of a law-abiding state and enter once again upon a government of men and not of law; we shall revert, in other words, to the condition against which the Fathers struggled and against which the forces of liberty were arrayed for centuries in English history. If the federal government can under pressure reach beyond its legal competence to do things for the state, there can not in logic be an end; the very framework of government itself may be warped and broken under the pressure of opportunism and exigency. It is easy enough to argue that a President can go beyond his constitutional limits because he can act more expeditiously than a cumbersome Congress. Even now, at least one able, influential and thoughtful journal (I do not mention the hair-brained variety) is demanding "centralized democracy," which is a euphemism for consolidated government and centralized authority. But from the highest point of view, can there be any greater danger than the conscious breach of confining law, unless it arises from the hypocritical pretense of regard for law, while one is consciously going beyond its limits? Have we reached that stage in our fretting against the bars of legal federalism?

It is strange, then, I may say in conclusion, that the two fundamentals that were striven for so long, the two great ideas which were embedded in our constitutions, and which appeared to make them the lasting resting place of permanent principles, the product of centuries of discussion and combat, are now in especial peril. To say the least, we are looking at them critically and pondering their value. Have we outgrown the idea of essential individualism with which our constitutions are impregnated, and the great idea of building up a competent federal republic, not on opportunism or a temporary view of justice, but on law?¹⁴ It was a saying, I believe, of Castelar, that man is free when he has to obey no one save the law. We may stop to question whether we really are free when we see that we are compelled to shape our actions by all sorts of men that prey upon the community. But we may add to this saying that liberty exists under government when there is a standing law to live by; and this, which is of course the elemental American idea

¹⁴ It should, of course, be noticed that this was the essence of the Philippine question. The judge that announced the doctrine on which the government of the Philippines rests, has declared but recently that Congress is limited in its management of the territories only by natural rights. *BROWN, J.*, in *Rasmussen v. U. S.*, 197 U. S. 516, 531. This, it is true, was the early contention of the American colonists against Great Britain; but we should notice that the outcome of their contention was the establishment of a government strictly confined by law.

woven into our constitutions, means that, if we have liberty, government itself must be the slave of law. Are we ready in studied advertence or by conscious frank design to abandon this principle?

Edmund Burke, the wise and philosophic friend of America, in one way heralded the successful British empire and ridiculed the idea, on which as a matter of fact the Americans reared the mighty fabric of a great imperial republic. He cast aside the notion of unchangeable law, and of abstract legal right as the foundation of political action: "The spirit of practicability, of moderation, and mutual convenience will never call in geometrical exactness as the arbitrator of an amicable settlement." Let us notice, however, that this Titan among eighteenth century statesmen also declared: "I feel an insuperable reluctance in giving my hand to destroy any established institution of government upon a theory however plausible it may be." But if a government of law is to continue, and if we are to have the liberty that comes from law, we need to remember the old classification of the foundations of the state: monarchy rests on fear, aristocracy on ambition, but democracy on virtue.

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